IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 803 OF 2002.
ALONG WITH
CRIMINAL APPLICATION NO. 797 OF 2002.
CRIMINAL APPLICATION NO. 798 OF 2002.
CRIMINAL APPLICATION NO. 799 OF 2002.
CRIMINAL APPLICATION NO. 801 OF 2002.
AND
CRIMINAL APPLICATION NO. 802 OF 2002.

A.C.Narayanan,
40 (New No.34),
Pinjala Subramanium Road,
Thyagarayanagar,
Chennai 600 017. ... Applicant.
(In all the above Applications.)

Versus.

1. State of Maharashtra.

2. Mrs.Doreen Shaikh,
Plot No.337, Theresian Society, "B" Wing,
Flat No.12, 16th Road,
Bandra (W), Mumbai 400 050. ... Respondents
(In all the above Applications.)

Shri G.S.Hegde with Shri C.M.Lokesh, Advocates i/by M/s.Hegde & Associations for Applicant in all the above Applications.

Shri J.A.Udaipuri with Shri Kanse, Advocates for the Respondent No.2 in all the above Applications.

Shri A.S.Gadkari, A.P.P. for the Respondent-State in C.A.Nos.797/02, 798/02, 799/02, 801/02 & 802/02.

Shri K.V.Saste, A.P.P. for the Respondent-State in C.A.No.803/02.

CORAM : ABHAY S. OKA, J.

DATED : 12th August, 2005.

ORAL JUDGMENT.

1. On the last date Counsel for the parties were heard. These Applications are filed by the Accused in Complaints under section 138 of the Negotiable Instruments Act, 1881,(hereinafter referred to as "the said Act of 1881"). The challenge in these Applications under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") is to the order dated 29th November 2000 passed by the learned Additional Chief Metropolitan Magistrate, 8th Court at Bandra, Mumbai. The prayer is for calling for the records of the case pending in the Court of the Metropolitan Magistrate. By the order impugned the Application made by the Applicant for discharge/recalling process has been rejected by the learned trial Judge. Since the facts of all the applications are admittedly more or less similar, for the sake of convenience, reference is made to the facts of Criminal Application No.803 of 2005.

2. The original Complainant is one Shaikh Anwar Karim Bux and the Respondent No.2 herein is his Power of

Attorney holder. The complaint is signed and filed by the Respondent No.2 who is the Constituted Attorney of the Complainant. Verification of the Respondent No.2 was recorded and on 3rd April 1998 the learned Additional Chief Metropolitan Magistrate issued the process. The Application for discharge/recalling of the order of process has been rejected by the learned Magistrate by the impugned order.

3. Shri Hegde appearing for the Applicants in all the Applications pointed out that in view of the law laid down by the Apex Court in Adalat Prasad's case reported in 2004 Supreme Court Cases (Cri.) page 1927, the Application made by the Applicant before the trial Court was not maintainable. However, he has pointed out the averments made in the Criminal Application and in particular in paragraph 11 in which it is stated that the Application is filed for quashing the Criminal Complaint. He, therefore, submitted that this Court should consider the prayer for quashing the complaint in the present petition under section 482 of the said Code. Shri Hegde submitted that the Constituted Attorney of the Complainant could have filed the complaint but the Constituted Attorney could not have signed the complaint. He submitted that under section 200 of the

said Code, the verification of the Complainant was required to be recorded and in view of the clear position of law, the verification of the Constituted Attorney could not have been recorded. He submitted that as the mandatory requirement of section 200 of the said Code is not complied with, the order issuing the process deserves to be quashed. He has made reference to various decisions of this Court and the Apex court which will be considered in the later part of the Judgment.

4. The learned Counsel appearing for the Respondent No.2 has made diverse submissions. However, I am referring to only those submissions made by the learned Counsel which are relevant to the case. Placing reliance on various decisions of this Court, other High Courts and the Apex Court he submitted that a power of attorney holder can sign and verify the complaint under section 138 of the said Act of 1881. He submitted that the Respondent No.2 being the constituted attorney had rightly verified the complaint. He submitted that the application is belatedly filed and hence it should not be entertained. He submitted that instead of impleading the original Complainant as party to the Application, the Applicant has impleaded the power of attorney holder

of the original Complainant as a party. He submitted that the plea is already recorded and thus at this stage the application should not be entertained.

5. The Application made by the Applicant before the learned trial Court was for discharge. The Application was also for recalling the order issuing process. As fairly conceded by the Counsel appearing for the Applicant, in view of the recent decision of the Supreme Court in the case of Adalat Prasad, the application made by the Applicant before the trial Court was not maintainable. However, both the Counsel appearing for the parties have made submissions on merits of the order issuing process and therefore, I am considering the said submissions.

6. Under section 142 of the said Act of 1881 an exception is carved out to the general principle that any person can set criminal law in motion, by providing that the complaints under section 138 can be filed only by the the payee or by the holder in due course of the cheque. The submission of Shri Hegde is that even assuming that the complaint could have been filed by the Respondent No.2, verification of the original complaint ought to have been recorded. A reference will have to

be made to a decision of this Court reported in 2000 Vol.102(1) Bom.L.R. page 908 (Dr.Pradeep Mohanbay v/s. Mr.Minguel Carlos Dias). The learned Single Judge of this Court after considering the provisions of section 142 of the said Act of 1881 held that the Complainant can appoint a power of attorney holder for filing a complaint under section 138 of the said Act of 1881. The learned Single Judge however observed that neither the Code nor the said Act contemplates that any one can depose for and on behalf of the complainant. This Court held that in such a complaint, the Power of Attorney is entitled to appear as a witness and depose in respect of facts which are within his knowledge and on the basis of record on which reliance is placed. This Court noted that in the case before it no objection was taken when the Power of Attorney holder examined himself. Shri Hegde pointed out that the view taken by this Court in the said decision is approved by the Apex Court in a case reported in 2005(1) Mah.L.J. page 1170 (Janki Vashdeo Bhojwani and anr. v/s. Indusind Bank Ltd. & ors.) What has been held by the Apex Court is that the word "acts" used in Order III Rules 1 and 2 of the Code of Civil Procedure, 1908 is confined only in respect of the acts done by the holder of the Power of Attorney in exercise of power granted by the instrument. The Apex

Court held that the Power of Attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. The Apex Court held that the Constituted Attorney cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. The submission is sought to be made on the basis of this decision of the Apex Court that the verification of the Respondent No.2 recorded is not a verification in the eyes of law and, therefore, the order issuing process will have to be quashed and set aside.

7. The decision of this Court in the case of Dr.Pradeep Mohanbay (supra) and the decision of the Apex Court in the case of Janki Vashdeo (supra) has been considered by this Court in a Judgment reported in 2005(2) Mah.L.J. page 1003 (Mamatadevi Prafullakumar Bhansali v/s. Pushpadevi Kailashkumar Agrawal). The question before this Court was whether a holder of the Power of Attorney of the Complainant is entitled to sign and file a complaint under section 138 of the said Act of 1881. In

paragraph 21 of the said decision this Court held that:

> "Thus, the power of attorney holder who is duly and properly authorised to do so can file complaint under section 142 of N.I.Act towards dishonour of cheque for offence under section 138 thereof in the name of the principal for signing for and on behalf of the principal."

In the same decision, the learned Single Judge considered the provisions of section 200 of the said Code which provides for examination of the complainant on oath as well as the witnesses present. In paragraph 27 the learned Single Judge considered the effect of the amendment to the provisions of the said Act of 1881 brought into force by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. By the said Amendment Act, section 145 was brought on the statute book. In the context of section 145 and section 146, this Court held that the said sections would even dispense with the recording of evidence of the complainant as contemplated by section 200 of the said Code. This Court observed that, however, it would be open to the discretion of the concerned Magistrate to put questions to the complainant if he considers it

necessary. In the present case, the provisions of the said Amending Act cannot be taken into consideration at this stage as the Complaint is filed prior to coming into force the said amending Act and in fact the process is issued in the year 1998. This court has, however, dealt with the question whether a constituted attorney can record verification of the complainant and answered the question in paragraph 26 this Court has held thus:

> "26. Now the point to be addressed is how and in what manner the facts stated in the complaint towards dishonour of cheque under section 138 should be proved at the stage of issue of process and even on merits. What follows is as follows:
>
> (a)that whenever on the statements contained in the complaint, if the payee or holder in due course who is the complainant and on the basis of the statement contained in the complaint is himself has witnessed of part or full transaction which has led to the receiving of the cheque and its dishonour, the complainant alone should be the witness of the complaint.
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> (b) If there are some transactions or part of transactions witnessed by some other person including by a person who is power of attorney,

in an eventuality where part of the transactions are witnesses by another person including the power of attorney, in such cases the complainant and such other person including the power of attorney could be the witness. In such eventualities, the power of attorney who may file a complaint for and on behalf of the complainant has to appear in his capacity as witness and not as a power of attorney.

(c) In the case of transactions, where depending upon what is disclosed in the complaint, if all transactions are undertaken by the power of attorney in total exclusion of the payee or the holder in due course i.e. title holder of such cheque, in such eventuality, the power of attorney holder in addition to his capacity to file the complaint on the basis of power of attorney, alone has to be the witness in place of complainant apart from other witnesses if involved in the transactions. Thus, power of attorney himself being a witness right from the inception in the transaction, and if such statement is incorporated in the complaint, the statement contemplated by section 200 has to be recorded by the power of attorney for and on

> behalf of the complainant while doing so he does it duly as GPA and as a witness which position are inseparable."

This Court has, therefore, held that in certain cases the Constituted Attorney of the complainant can depose under section 200 of the said Code. I am bound by the decision of this Court in the case of Mamatadevi (supra) and, therefore, the present case will have to be considered in the light of the said decision.

8. Coming to the facts of the present case, what is required to be considered is that in view of the test laid down in the case of Mamtadevi, whether the Respondent No.2 could have deposed under section 200 of the said Code. As pointed out earlier, even at the stage of issuing the process, the view taken by this Court is if there are some transactions or part of transactions witnessed by some other person including by a person who is the power of attorney holder of the complaint and such person including the power of attorney will be the witness. However, in such a case the Constituted Attorney has to appear in his capacity as a witness and not as a power of attorney holder.

However, in case of matters covered by category (c) referred to in paragraph 26, it is held that the power of attorney holder is competent to depose under section 200 of the said Code. On a plain reading of the complaint and the verification of the Respondent No.2, it is difficult to come to the conclusion that the Respondent No.2 had no personal knowledge of the transactions which are referred to in the complaint. The statement of the Respondent No.2 has been recorded on oath which shows that the facts stated in the complaint are within the knowledge of the Respondent No.2. It is not necessary that the Respondent No.2 should say specifically in so many words in the verification that she was aware about all the transactions. A perusal of the grounds taken in the Criminal Application shows that it is not the case made out by the Applicant that the Respondent No.2 had no personal knowledge of the transaction in question. It is not the case made out that the Respondent No.2 had no personal knowledge about the facts stated in the complaint.

9. At this stage it will be necessary to refer to the decision of the Apex Court in the case of Dalmia Cement (Bharat) Ltd. v/s. Galaxy Traders and Agencies Ltd.

and others) reported in 2001 (6) S.C.C. page 463. The Apex Court has held that section 138 was incorporated in the statute with a specified object of making a special provision by incorporating a strict liability so far as a cheque is concerned. The Apex Court has observed in paragraph 3 of the said decision as under:

> "3. The Act was enacted and section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to

carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. **The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of**

the country." (Emphasis supplied).

10. Thus what has been held by the Apex Court is that the laws relating to the said Act of 1881 are required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law. Any efforts to defeat the objectives by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in the smooth and healthy manner. In the same case the Apex Court held that section 138 of the said Act makes a civil transaction into an offence by fiction of law. At this stage it will also be necessary to refer to the decision of the Supreme Court reported in 2004(7) S.C.C. page 15 (Monaben Ketanbhai Shah and another v/s. State of Gujarat and others). The Apex Court held that in case of complaint under section 138 of the said Act of 1881 if substance of the allegations made in the complaint fulfil requirements of the said section, complaint has to proceed and is required to be tried. The Apex Court held that in construing a complaint under section 138 of the said Act of 1881, a hypertechnical approach should not be adopted so as to quash the same. In the present case on a plain reading of the complaint it is seen that all ingredients

of the offence under section 138 are made out. It appears that an attempt has been made to delay the proceedings of the case by raising hypertechnical objections. As held by the Apex Court no interference is called for and the Applications deserve to be dismissed.

11. Accordingly the Criminal Applications are dismissed.

12. At this stage the learned Counsel appearing for the Applicant submitted that ad-interim relief granted by this Court may be extended by eight weeks. The learned Counsel appearing for the Respondent No.2 has objected to the said prayer. However, the order of stay has been operating for quite some time. The same will continue to operate for a period of 8 weeks from today.

Judge.